



Comptroller General
of the United States

Washington, D.C. 20548

149677

Decision

Matter of: Computervision Corporation

File: B-252632

Date: July 19, 1993

Alex D. Tomaszczuk, Esq., John E. Jensen, Esq., and Arnold R. Finlayson, Esq., Shaw, Pittman, Potts & Trowbridge, for the protester.
Donald S. Lindberg, American Technologies Corporation, an interested party.
April L. Nordeen, and Donna J. Lester, United States Department of Agriculture, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office will not consider an allegation that the awardee will be unable to provide software support services and software upgrades in accordance with the solicitation requirements, notwithstanding its proposal to meet the requirements, since whether the awardee can and will perform the contract are matters of responsibility and contract administration.
2. Where the solicitation did not require firms to offer all line items, but stated that firms offering all line items would be considered more advantageous to the government than firms not offering all line items, and where it appeared from the solicitation that line items for which bonus technical points were available were weighted equally, the protester was not prejudiced by the agency's award of more points to the awardee for offering all line items even though all line items were not weighted equally.

DECISION

Computervision Corporation protests the award of a contract to American Technologies Corporation (ATC) under request for proposals (RFP) No. 02-3K06-93, issued by the Agricultural Research Service, United States Department of Agriculture, for hardware and software maintenance support services and software upgrades for a Solbourne mini-computer. Computervision essentially argues that ATC cannot provide the required services because it is not licensed or

authorized by Solbourne, the original equipment manufacturer (OEM), to provide the required services and upgrades and that the agency improperly failed to disclose in the RFP the importance of various line items for which bonus technical points were available.

We dismiss the protest in part and deny the protest in part.

The RFP, issued on an unrestricted basis on October 30, 1992, provided for the award of a firm, fixed-price contract for the base period and two 1-year option periods to the responsible offeror whose offer, conforming to the RFP, was most advantageous to the government, cost or price and technical evaluation factors considered. The RFP required, among other things, that the successful contractor assist the government in maintaining Solbourne software and provide software upgrades for the term of the contract at no cost to the government. The RFP stated that if after a specified period of time, the contractor is unable to repair malfunctioning equipment and/or software, the government could directly request assistance from the OEM, with the contractor reimbursing the government for the costs of the assistance. While the RFP listed 22 line items, B-01 through B-22, firms were only required to offer 11 of these line items, characterized as the computer's core operating system, in order to be considered for award. The RFP advised, however, that firms which offered all 22 line items would be considered more advantageous to the government.

The RFP's evaluation scheme called for proposals to be evaluated on a 900-point scale. Prior to receiving any technical points, an offeror had to fully comply with mandatory statement of work (SOW) requirements involving maintenance, replacement parts, maintenance downtime credits, principal period of maintenance, discontinuance of service, increase/decrease in quantity of equipment and/or systems, maintenance for new equipment, documentation, completion of maintenance, and software upgrades. If an offeror fully complied with these mandatory SOW requirements, then the offeror could receive up to 100 technical points each, for a total of 500 points, for 5 non-mandatory, but desirable, SOW requirements involving original equipment/software manufacturer contact, problem escalation procedures, past performance, personnel qualifications, and response time. In addition, the RFP provided that firms offering 7 non-mandatory, non-core operating system line items, including line item No. B-22 for maintenance of an Oracle DataBase Management System would receive up to 100 bonus points. Finally, offerors could receive up to 300 points for price, with the offeror submitting the lowest total evaluated price receiving the maximum number of points for price and the other offerors receiving a percentage of these points based on a ratio of

the low priced offeror's price to the other offerors' prices. Thus, the RFP basically called for the most advantageous offeror to be determined by the overall scores.

Two firms, Computervision and ATC, submitted proposals by the initial closing date of December 8. Both proposals were included in the competitive range. Following discussions, each offeror submitted a best and final offer (BAFO). Computervision and ATC both submitted prices for the 11 mandatory core line items and both offerors were deemed to have complied with the mandatory SOW requirements, including the requirement to furnish software upgrades. For the non-mandatory, but desirable, SOW requirements, including contact with the original equipment/software manufacturer, Computervision received 440 technical points and ATC received 395 technical points. Computervision submitted prices for 4 of the non-mandatory bonus line items and received 50 technical bonus points. ATC submitted prices for all 7 of the non-mandatory bonus line items and received 100 technical bonus points. Because ATC submitted the lowest total evaluated price (\$134,604)¹ it received 300 points and Computervision (which submitted a price of \$139,608) received 289 points, a percentage of the total available points for price. Accordingly, Computervision's overall score was 779 points (490 total technical points and 289 price points) and ATC's overall score was 795 points (495 total technical points and 300 price points).

On February 24, 1993, the contracting officer awarded a contract to ATC, deemed the most advantageous offeror in light of its offer for all 22 line items, its higher overall score, its higher technical score, and its lower total evaluated price. Computervision subsequently filed this protest.

Computervision argues that ATC is not capable of providing the required software support services or furnishing the required software upgrades for the Solbourne mini-computer because it is not licensed or authorized by Solbourne, the OEM, to provide these services and upgrades for Solbourne computer systems. In this regard, Computervision states that it is one of only two firms (Computervision operates in the eastern United States and the other firm operates in the western United States) licensed and authorized by Solbourne to provide required software support services and software upgrades on behalf of Solbourne for its computer systems.

¹In arriving at ATC's total evaluated price, the agency deducted from ATC's proposal the prices of the line items which, while offered by ATC, were not offered by Computervision in order to equally compare the prices of the two proposals. The price evaluation is not in dispute.

Accordingly, Computervision believes that since it is licensed and authorized to provide these services and upgrades, it, not ATC, should have received the award.

In its proposal, ATC stated that it understood and accepted all of the SOW requirements. While the record shows that ATC is not licensed or authorized by Solbourne to provide software support services and software upgrades, there was no criterion in the RFP requiring that the successful offeror be licensed or authorized by the OEM. Rather, consistent with the RFP requirement that the successful contractor assist the government in maintaining Solbourne software and that the contractor provide software upgrades, ATC stated in its proposal that it established contract terms for Solbourne software telephone technical support and for Solbourne technical upgrades and updates. The record shows that ATC intends to subcontract the agency's software support requirements to Solbourne, thus maintaining the integrity of Solbourne's proprietary data rights. In the event that Solbourne will not provide the required software support services and software upgrades under a subcontract with ATC, the record shows that Solbourne is willing to contract directly with the agency for the required services and upgrades. This alternative is consistent with the RFP provision which states that if after a specified period of time, the contractor is unable to repair malfunctioning equipment and/or software, the government can directly request assistance from the OEM, with the contractor reimbursing the government for the costs of the assistance.

Whether ATC can and will perform in conformance with the solicitation requirements are matters of responsibility and contract administration which our Office will not consider. Eyring Corp., B-245549.7, Mar. 31, 1992, 92-1 CPD ¶ 320. A determination that an offeror is capable of performing a contract is based, in large measure, on subjective judgments which generally are not susceptible to reasoned review. An agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1993). Here, the record shows that the contracting officer made an affirmative determination of ATC's responsibility based on its financial capability, its previous successful completion of other government contracts, favorable recommendations from its references, and the fact that its service personnel have experience with the hardware and software for Solbourne computer systems, with one technician having assembled and configured this agency's Solbourne computer system.

Since Computervision has failed to make a showing of possible fraud or bad faith, and since the RFP contains no definitive responsibility criteria, we have no basis to review the contracting officer's affirmative determination of ATC's responsibility.² Moreover, to the extent Computervision speculates that ATC cannot perform the contract without a license from Solbourne, this allegation concerning ATC's actual performance involves a matter of contract administration which is not within the jurisdiction of our Office. 4 C.F.R. § 21.3(m)(1); Specialty Plastics Prods., Inc., B-237545, Feb. 26, 1990, 90-1 CPD ¶ 228.

Computervision also argues that the agency violated Federal Acquisition Regulation § 15.605(e) which requires an agency to disclose in a solicitation "any significant subfactors" to be considered in the source selection decision and their relative importance, and to inform offerors of the "minimum requirements that apply to particular evaluation factors and significant subfactors." Computervision apparently believed that because the RFP did not assign specific weights to the 7 bonus line items that these bonus line items were equally weighted at 14.28 bonus points each. The agency report shows, however, that the agency weighted bonus line item No. B-22 at 30 points, another bonus line item at 20 points, and 5 other bonus line items at 10 points each. Under the evaluation scheme used by the agency, Computervision received 50 bonus points for the 4 bonus line items it offered. Since Computervision did not offer bonus line item No. B-22, weighted at 30 points, and 2 other bonus line items, weighted at 10 points each, it had an automatic deficit of 50 bonus points. Computervision now contends that had it known that bonus line item No. B-22 was worth 30 points, it would have made arrangements with Oracle, the OEM, for this line item, to maintain this line item and it would have offered this line item.

We agree that an offeror, like Computervision, could reasonably assume that because the RFP did not assign specific weights to the bonus line items, that these line

²Computervision stated in its proposal that it was the only authorized service supplier for Solbourne in the eastern United States. Contrary to the protester's argument, we do not believe that this representation placed any affirmative obligation on the contracting officer to investigate whether ATC was licensed or authorized by Solbourne. As discussed above, the contracting officer made a reasonable determination that ATC was capable of performing the contract, irrespective of whether ATC was an authorized service supplier for Solbourne. The RFP did not require a contractor to be licensed or authorized by the OEM as a precondition to being eligible for award.

items were weighted equally. See, e.g., Martech USA, Inc., B-250284.2, Feb. 8, 1993, 93-1 CPD ¶ 110. Since the agency, however, did not evaluate these bonus line items equally and, in fact, evaluated bonus line item No. B-22 at three times more than five other individual bonus line items and 1.5 times more than another bonus line item, we believe the RFP was defective since it failed to disclose the relative weights of the bonus line items. See H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203. Nevertheless, we conclude that Computervision was not prejudiced by the defect in the RFP and the agency's evaluation of proposals.

If, as Computervision asserts, the bonus line items were evaluated equally at 14.28 points each, Computervision would have received 57.12 bonus points for the 4 bonus line items it offered. Because Computervision did not offer 3 bonus line items, it would have had an automatic deficit of 42.84 bonus points. Thus, Computervision's overall score would have been 786.12 points (497.12 total technical points and 289 price points) compared to ATC's overall score of 795 points (495 total technical points and 300 price points). ATC would remain the highest overall scored offeror. Also, had Computervision offered bonus line item No. B-22, or any of the other bonus line items which it did not initially offer, the price differential between it and ATC would have been even greater because it would have included in its proposal prices for additional services to be provided to the government. Computervision does not state that it would have offered these services at no charge to the government.

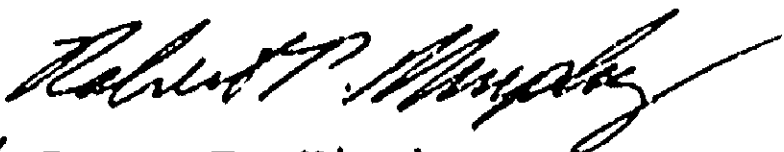
Moreover, by rescoring the proposals by giving equal weight to the bonus line items, the agency could reasonably have determined that the proposals submitted by Computervision and ATC were essentially technically equal because of the approximate 1 percent difference in the overall scores and less than 1/2 percent difference in the total technical point scores. See Koba Assocs., Inc., B-251356, Mar. 25, 1993, 93-1 CPD ¶ 267. When proposals are deemed essentially technically equal, price properly becomes the determining factor in the selection of the awardee. Conax Florida Corp., B-241743, Feb. 26, 1991, 91-1 CPD ¶ 214. In these circumstances, since ATC submitted the low price, an award to ATC would still have been appropriate.¹

¹There is no support in the record for Computervision's position that its proposal was technically superior to ATC's proposal and that it would have received the award based on its higher score for the non-mandatory, but desirable, SOW requirement involving past performance. In fact, agency evaluation documentation states that both proposals were found technically acceptable.

Finally, we are not persuaded by Computervision's after-the-fact statement that if it had known the actual weights to be accorded the bonus line items, it would have offered all of the bonus line items. The award language in the RFP provided that firms offering all line items, including the bonus line items, would be deemed more advantageous to the government than firms not offering all line items. Thus, Computervision was on notice that regardless of the weights to be accorded each bonus item, if it did not offer all bonus items, another offeror proposing all bonus items could be awarded the contract. In the exercise of its business judgment in preparing its proposal, Computervision decided not to offer 3 bonus line items, automatically giving up approximately 43 bonus points, only 7 fewer points than it lost under the agency's evaluation of proposals.

Therefore, we conclude that Computervision was not prejudiced by the defect in the RFP and the agency's evaluation of proposals. Accordingly, we have no basis to disturb the award to ATC as the most advantageous offeror.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel